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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Donna R. Searcy, Secretary
Federal Communications Commission
Washington, DC 20554

Re: Notification of Ex Parte Presentations
in MM Docket No. 92-259

Dear Ms. Searcy:

Pursuant to Section 1.1206 of the Commission's rules, this is to advise the Commission that on February 2, 1993, undersigned counsel for Viacom International Inc. (Viacom) and Edward Schor, Senior Vice President and General Counsel Communications of Viacom met with the following parties to discuss certain matters raised in Viacom's Comments in MM Docket No. 92-259:

1. A meeting was held with the staff of the Mass Media Bureau and the Office of Plans and Policy, with William H. Johnson, Alexandra Wilson, Marcia Glauberman, Jonathan D. Levy, and Bruce A. Romano in attendance.

2. A meeting was held with Robert E. Branson, the Senior Advisor to Commissioner Andrew C. Barrett, which meeting was also attended by two law clerks in Commissioner Barrett's office.

At the meetings, there was discussion of those portions of Viacom's Comments arguing that must-carry regulations should not be applied in a manner that would authorize a cable operator to abrogate existing cable network affiliation agreements in order to comply with must-carry, that retransmission consent is not applicable to distant signals, and that local stations may not grant retransmission consent unless they are authorized to do so in their contracts with their video programmers. During the discussion about the impact of must-carry requirements on existing agreements with cable networks, the Reply Comments of the National Association of Broadcasters on this matter were discussed, and the attached Memorandum sets forth the substance of that discussion and further documentation in support of the positions taken.

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If there are any questions concerning the foregoing, please communicate with the undersigned.

Sincerely yours,

George H. Shapiro

Enclosure

cc: William H. Johnson, Esq.
Alexandra Wilson, Esq.
Marcia Glauberman, Esq.
Jonathan D. Levy, Esq.
Bruce A. Romano, Esq.
Robert E. Branson, Esq.
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MEMORANDUM

Response of Viacom International Inc. to NAB Legislative History Argument on Abrogation of Affiliation Contracts

At pages 7 through 21 of Viacom's Comments in MM Docket No. 92-259, Viacom argued that the 1992 Cable Act (the "Act") does not authorize a cable operator to abrogate any existing cable network affiliation agreements in order to meet its statutory must-carry obligations. In support, Viacom cited the fact that Congress removed from the Act provisions contained in earlier legislative proposals which sought to preempt existing affiliation agreements between cable operators and cable networks.[1/] Specifically, both the 1990 Senate and House versions of the Act (S.1880 and H.R.5267, respectively) defined the basic service tier in a manner which required basic tier carriage of must-carry signals while at the same time preempting existing cable network affiliation agreements that required the subject network to be carried on the basic service tier.[2/] Since both the Senate and the House deleted this preemption language from the final Senate and House versions of the Act (S.12 and H.R.4850, respectively), it is Viacom's position that Congress did not intend to preempt existing cable network

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1/ Viacom also argued that abrogation of existing affiliation contracts in favor of must-carry would amount to impermissible retroactive application of a federal statute, and that such retroactive application would in any event violate the constitutional due process rights of cable networks. The basis for these arguments is set forth fully in Viacom's initial comments, and Viacom therefore will not reiterate those arguments here or address NAB's responses thereto.

2/ The Senate bill permitted cable operators to include cable program networks on the basic service tier while the House Bill prohibited the inclusion of such networks on the tier.

affiliation contracts, and therefore did not intend to allow cable operators to abrogate those contracts where the carriage of cable networks conflicts with the operators' must-carry obligations under the Act.

NAB, however, asserts in its Reply Comments that Viacom's reliance on this portion of the Act's legislative history is "mistaken," and that Congress fully intended that the Act's must-carry provisions would preempt existing cable network affiliation contracts. In essence, NAB argues that the preemption provisions cited by Viacom are not dispositive because they appeared in the rate regulation sections of S.1880 and H.R.5267 stipulating the contents of the basic tier, not in the must-carry provisions of those legislative proposals. NAB contends that the preemption provisions cited by Viacom "dealt only with the tier on which cable program services could be placed on a cable system, not with whether such contracts could take precedence over systems' must carry obligations." NAB Reply Comments at 27-28. For the reasons set forth below, Viacom submits that NAB's legislative history argument fails because the preemption provisions of S.1880 and H.R.5267 directly address the relationship between cable network affiliation agreements and must-carry, and their removal has no reasonable explanation other than that Congress intended to recognize the continuing validity of existing cable network affiliation contracts.

Under S.1880, cable operators were required to carry "retransmitted local television signals" on the basic tier, and

were permitted to carry cable networks on basic if they chose to do so. Specifically, under Section 623(b)(3), a cable operator was permitted to "add to or delete from a basic cable service tier any video programming other than retransmitted local television broadcast signals." Section 623(b)(3) also provided that "[a]ny obligation imposed by operation of law or contract inconsistent with this subsection is preempted and may not be enforced." (Emphasis added.) In the Committee Report on S.1880, the Senate Committee on Commerce, Science and Transportation (the "Senate Committee") stated that "[i]f a contract . . . is abrogated and such contract requires carriage on the basic service tier or its equivalent, the Committee intends that the obligations undertaken pursuant to such contract shall require carriage on the next most widely subscribed to tier of service." S.Rep. No. 101-381, 101st Cong., 2d Sess. at 60 (1990). Hence, S.1880 not only required carriage of local broadcast signals on the basic tier, but specifically preempted any cable network affiliation contract requiring carriage of a cable network on the basic tier, and, if adherence to the contract would have prevented a local broadcast signal from being carried on basic, required that the cable operator abrogate the contract in favor of the local broadcast signal.

Similarly, Section 623(b)(2) of H.R.5267 required basic tier carriage of must-carry signals, as well as of any public, educational and governmental access channels required by

franchise.[3/] Section 623(b)(4), however, prohibited carriage of cable networks on the basic service tier, and, like S.1880 as interpreted in the Committee Report on S.1880, provided that a cable programming contract that required carriage on the basic service tier, or that established a rate for carriage (as part of the basic service tier), could not be enforced unless the contract was applied to require carriage of the subject programming on the next most widely subscribed to level of service.

It is abundantly clear from the above-cited legislative proposals that Congress did not, as suggested by NAB, intend to simply mandate whether or not a cable operator could carry a cable network on the basic service tier. Rather, both the 1990 Senate and House Bills and the 1991 House Bill[4/] not only specifically established a basic service tier but also provided that the statutory carriage rights of must-carry signals on that tier would always retain priority over the contractual carriage rights of cable networks. Thus, S.1880, the prior version of S.12, would have required a cable operator to remove a cable network from the basic tier in favor of a must-carry signal in the event of a conflict between the operator's contractual obligations to carry the network on basic and its statutory

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[3/] Under Section 623(b)(4)(B) of H.R.5267, cable operators were allowed to also carry on the basic tier certain nationally distributed public and government affairs cable networks.

[4/] The 1991 Bills in both the Senate and House are discussed infra.

obligations to carry local television broadcast signals.[5/] Hence, the purpose of Section 623(b)(3) of S.1880 was not simply to allow cable operators to select which cable networks would or would not be carried on the basic service tier. More accurately stated, the purpose of that section was to require carriage of local signals on the basic tier and to require the cable operator to abrogate its affiliation contracts with cable networks if necessary to comply with its statutory must-carry obligations. Similarly, H.R.5267 not only required carriage of local signals on basic, but also expressly preempted any existing cable network affiliation contract which required carriage of the network on the basic tier. Hence, like the preemption provisions in S.1880, the purpose of the preemption provisions in H.R. 5267 was not only to allow a cable operator to keep cable networks off of the basic tier, but also to require abrogation of cable network affiliation contracts in favor of preserving the must-carry rights of local stations.

Further, NAB has not given appropriate weight to the deletion of the above-cited preemption provisions from the Act. As the Supreme Court has stated, "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." INS

[5/] This is because Section 623(b)(3) preempted cable network affiliation agreements requiring carriage on the basic service tier while at the same time mandating basic tier carriage of local signals.

v. Cardoze-Fonseca, 480 U.S. 421, 443 (1987), quoting Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 393-393 (1980) (Stewart J., dissenting). Indeed, at the time S.12 was first introduced in 1991, it modified Section 623(b)(3) (as it had appeared in S.1880) to read as follows:

> A cable operator may add to or delete from a basic cable service tier any video programming other than retransmitted local television broadcast signals. Any obligation imposed by operation of law inconsistent with this subsection is preempted and may not be enforced.

Significantly, this modification of S.1880 deleted the phrase "or contract," thereby eliminating S.1880's preemption of existing contracts between cable operators and cable networks, and limiting the preemption to local laws or regulations which imposed impermissible carriage requirements.

On the House side, while the initial House legislative proposal introduced in 1991, H.R.1303, carried over Section 623(b)(4) (and its preemption language) from H.R.5267, Section 623(b)(2)(B) of H.R.4850, which was substituted for H.R.1303 in 1992 and was reported by the House Committee on Energy and Commerce, was modified to allow cable operators to add any video programming services to the basic tier; it eliminated preemption of franchise obligations and programming contracts altogether. The House-Senate Conference Committee ultimately incorporated the same provision into Section 623(b)(7)(B) of the Act.

NAB does not even discuss the fact that the Senate removed from Section 623(b)(3) the S.1880 language preempting existing

contracts. Further, although NAB acknowledges that neither Section 623(b)(2)(B) of H.R.4850 nor the Act itself includes the preemption provisions in Section 623(b)(4) of H.R.5267 and H.R.1303, it attempts to obfuscate the issue by quoting language in the House Report to the effect that cable systems are required to offer must-carry signals on the basic tier. NAB argues from there that the House "said nothing to suggest that section 623(b) might not require modifications to cable network program agreements." NAB Reply Comments at 29. NAB essentially is arguing that the absence of preemption provisions in H.R.4850 should be read to have the same legal effect as the inclusion of those same provisions in H.R.5267 and H.R.1303, a position which is both illogical on its face and unsupported by anything in the text or legislative history of the Act.[6/] Moreover, the House Report language relied upon by NAB only restates the requirement that must-carry signals cannot be carried on any tier other than basic, and does not either address the relationship between contractual carriage obligations and statutory must-carry obligations or otherwise suggest that the House's deletion of the preemption language discussed above is to be ignored. NAB

[6/] Also, NAB has not accounted for the fact that both the Senate and the House deleted from S.12 and H.R.4850 the provision which would have permitted carriage of a basic cable network on the next most widely subscribed to tier in the event of contract abrogation. It is extremely unlikely that Congress could have intended to retain preemption of cable network affiliation agreements in S.12 or H.R.4850 while at the same time eliminating the only statutory remedy available to cable programmers in the event of abrogation.

appears to assume that, because H.R.4850 modified the comparable provisions of H.R.5267 and H.R.1303 to permit carriage of cable networks on the basic service tier rather than requiring their removal to other tiers, continued carriage of cable networks on the basic service tier would be optional. As such, preemption language, according to the NAB, would be unnecessary because preemption was an unstated mandate of the Act in the event of a conflict between statutory requirements imposed on cable operators by the Act and contractual requirements imposed on them by their cable network affiliation contracts. According to the NAB, the Act always takes precedence. However, while in H.R.5267 and H.R.1303, Congress mandated that the Act would take precedence, in H.R.4850 and in the Act itself Congress specifically changed its earlier approach by removing the preemption provisions. The change in the provisions of H.R.4850 to permit carriage of cable networks on the basic tier thus cannot be read as providing an explanation for removal of preemption language that was contained in prior Bills.

NAB also notes that the Committee Report on H.R.4850 stated that Section 623(b) was not intended to preempt certain types of franchise provisions dealing with carriage of PEG channels. NAB Reply Comments at 29. NAB appears to suggest that the House therefore intended to preempt cable network affiliation contracts because it did not make a similar statement in the House Report with respect to those contracts. Viacom submits that the House's elimination of provisions in the text of the Bill preempting

cable network affiliation contracts belies any notion that the House thereby intended to simultaneously retain those provisions indirectly by reference in the Committee Report to non-preemption of franchise-imposed PEG requirements.[7/] Moreover, as noted at pages 12-13 of Viacom's initial comments, any different treatment between franchise-related PEG requirements and cable network affiliation contracts would in any event raise serious constitutional issues because agreements between cable operators and franchising authorities would then be accorded a preferential position in relation to agreements between cable operators and programmers.

In sum, Viacom submits that NAB's reading of the legislative history of the Act on the preemption question vis-a-vis cable network affiliation contracts is fundamentally at odds with both the norms of statutory construction and the language Congress

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[7/] Equally inapposite for similar reasons is NAB's reliance on Section 325(b)(6), which states in relevant part that nothing in Section 325 shall be construed "as affecting existing or future video programming licensing agreements between broadcast stations and video programmers." NAB Comments at 30, n.40. For example, a syndicator's contractual rights vis-a-vis whether its customer television station can grant retransmission consent are entirely unrelated to a cable network's contractual rights for carriage on its customer cable operator's basic tier, and the fact that Congress expressly protected the former does not imply that it did not intend to protect the latter, particularly in view of its removal of the preemption provisions from earlier versions of the Act as discussed above. Moreover, the language in Section 325(b)(6) cited by NAB, when read in combination with other provisions of the Act (e.g., Sections 614(b)(10)(C), Section 628(h)) reflects that Congress was aware of the Act's possible effect on existing contracts generally, and that it did not intend for the Act to preempt or modify any rights bargained for under existing contracts. Viacom Comments at 11-12.

chose to use when including the above-cited preemption provisions in the 1990 Bills in both Houses and in the 1991 House version of the Act. It is well settled that to divine Congressional intent a statute must be read as a whole, and its provisions should not read as existing independently of one another. Hence, the fact that Congress included the above-cited preemption provisions in the rate regulation as opposed to the must-carry sections of the 1990 Bills and 1991 House version of the Act cannot by itself mean that those provisions have no bearing on the relationship between cable network affiliation agreements and must-carry if the language of those provisions suggests otherwise. Indeed, the rate regulation and must-carry provisions of the Act and its predecessors are inextricably linked by the fact that the basic service tier created by Section 623 requires (and has always required) carriage of must-carry signals as provided for in the must-carry provisions of the statute. The creation of the basic service tier and the obligation to carry local broadcast signals on that tier cannot be separated, since without must-carry obligations the requirement that local broadcast signals be carried on the basic tier would be superfluous. Thus, statutory provisions which would have preempted cable network affiliation agreements in favor of must-carry signals as set forth in the 1990 Bills and 1991 House version of the Act were not, as suggested by NAB, included purely as a rate regulation matter, and in fact were designed to address directly the relationship between cable network affiliation agreements and a cable

operator's statutory obligation to carry local broadcast signals. The absence of similar provisions in the 1992 Act cannot have been inadvertent, and their removal has no reasonable explanation other than that Congress has abandoned its original preemption proposals in favor of recognizing the continuing validity of existing contracts.